

APPEAL NO. 180294
FILED MARCH 29, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 30, 2017, with the record closing on January 2, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to post-traumatic stress disorder (PTSD), depression and chronic severe pain disorder; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on January 26, 2017; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant did not have disability from July 17, 2015, through the date of the CCH as a result of the compensable injury of (date of injury).

The claimant appealed the ALJ's determination regarding disability, arguing that the ALJ erred in determining that the claimant had no disability because she received her preinjury wage in the form of assault leave pay during the period she was unable to work. The self-insured responded, urging affirmance of the ALJ's disability determination.

The respondent/cross-appellant (self-insured) appealed the ALJ's determinations regarding extent of the compensable injury, MMI and IR as being contrary to the great weight of the evidence. The claimant responded arguing that the ALJ's determinations regarding extent of injury, MMI and IR are supported by the preponderance of the evidence and should be affirmed.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant, a special education diagnostician for the self-insured, sustained an injury when she was assaulted during a meeting by a parent of one of the students for whom the claimant was providing an assessment. The claimant testified that she was unable to work for the period beginning on July 17, 2015, and continuing through a date during the last week of July, 2017, when she returned to her position with accommodations provided by her employer. The claimant further testified that she received assault leave pay in an amount equal to her preinjury wage during the time she was unable to work. The parties stipulated, in part, that the self-insured accepted as compensable a cervical sprain/strain, a right shoulder sprain/strain, abrasions and contusions to the bilateral arms and hands, and adjustment disorder with anxiety.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury (date of injury), extends to PTSD, depression and chronic severe pain disorder is supported by sufficient evidence and is affirmed.

MMI/IR

The ALJ's determination that the claimant reached MMI on January 26, 2017, with a zero percent IR is supported by sufficient evidence and is affirmed.

DISABILITY

The disability issue before the ALJ was whether the claimant had disability from July 17, 2015, to the date of the CCH resulting from an injury sustained on (date of injury). The ALJ states in the Discussion section of her Decision and Order that the compensable injury was not a cause of the claimant's inability to earn her preinjury wage from July 17, 2015, through the date of the CCH because she received her preinjury wage in the form of assault leave during this time. In her second Finding of Fact No. 5¹, the ALJ stated that the compensable injury was not a cause of the claimant's inability to earn her preinjury wage during the period from July 17, 2015, through the date of the CCH. In her Conclusion of Law No. 6 and the Decision section of her Decision and Order the ALJ determined that the claimant did not have disability from July 17, 2015, through the date of the CCH resulting from the compensable injury. We disagree.

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(43) provides, in part, that wages "includes all forms of remuneration payable for a given period to an employee for personal services."

¹ We note the ALJ's Decision and Order contains two Findings of Fact No. 5.

Texas Education Code Section 22.003(b), which applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by the code, provides, in part, that “[n]otwithstanding any other law, assault leave policy benefits due to an employee shall be coordinated with temporary income benefits (TIBs) due from workers’ compensation so that the employee’s total compensation from [TIBs] and assault leave policy benefits equals 100 percent of the employee’s weekly rate of pay.” Clearly, the law acknowledges that a Texas school district employee may receive assault leave benefits as well as TIBs due to an inability, because of a compensable injury, to earn wages equivalent to the preinjury wage. While the amount of TIBs to which the claimant is entitled may be affected by her receipt of assault leave pay, the issue of the amount or entitlement to TIBs was not before the ALJ in this case. See Appeals Panel Decision (APD) 061713-s decided October 20, 2006.

We note further that APD 050565, decided May 2, 2005, involved the sole issue of disability in a case in which the claimant sustained a compensable injury and was unable to work for a period of time during which he received salary continuation from the employer. The carrier in that case contended that since the claimant received salary continuation during the claimed disability period, he was not entitled to TIBs. The Appeals Panel noted that neither the issue of payment of TIBs nor the accrual date of income benefits was before the hearing officer or the Appeals Panel, and that the only issue before the Appeals Panel was disability. The Appeals Panel cited APD 951736, decided December 7, 1995, and APD 941073, decided September 26, 1994, as cases in which the claimant continued to receive his salary but did not work because of a compensable injury. The Appeals Panel held in those cases that the claimant had disability because the injured employee “was not performing personal services for the employer in exchange for the salary continuation,” and that the claimant had disability during the period that he was unable to work. In APD 050565, *supra*, the Appeals Panel held that the hearing officer erred in determining that the claimant did not have disability because he received salary continuation benefits for a period of time while he was not working, and, for such reason, reversed the determination and rendered a new decision that the claimant did have disability during such period of time.

In the case on appeal, the claimant testified that she was unable to work due to the compensable injury for the period of time from July 17, 2015, and continuing to the date she returned to work for the employer during the last week of July, 2017, and that during such period she received assault leave pay in an amount equal to her preinjury wage; however, the evidence was uncontroverted that the claimant performed no personal services for the employer in exchange for the assault leave pay she received. The ALJ’s statement that the claimant received her preinjury wage from July 17, 2015, through the date of the CCH is legally incorrect because assault leave payments

received by the claimant during the time period from July 17, 2015, until the date the claimant returned to work in late July, 2017, are not wages under the 1989 Act. For such reason, we hold the ALJ erred in finding that the claimant had no disability for the period beginning July 17, 2015, during which period she was not working and receiving assault leave pay. We are unable to render a new decision regarding disability in this case because the evidence does not establish the date the claimant returned to work or whether, upon her return to work, she received wages equivalent to her preinjury wage. We accordingly reverse the ALJ's determination that the claimant did not have disability from July 17, 2015, through the date of the CCH as a result of the compensable injury of (date of injury), and remand the issue of disability for that period to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to PTSD, depression and chronic severe pain disorder.

We affirm the ALJ's determination that the claimant reached MMI on January 26, 2017, with a zero percent IR.

We reverse the ALJ's determination that the claimant did not have disability from July 17, 2015, through the date of the CCH resulting from the compensable injury and we remand the issue of disability to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to make findings regarding the date the claimant returned to work subsequent to July 17, 2015, and whether she returned to work earning wages equivalent to her preinjury wage. The ALJ is then to make a determination concerning disability consistent with the evidence and this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

CONFIDENTIAL

Tex. Labor Code § 402.083

The true corporate name of the insurance carrier is **ALDINE INDEPENDENT SCHOOL DISTRICT, a self-insured governmental entity, through T.A.S.B. Risk Management Fund**, and the name and address of its registered agent for service of process is

**DR. WANDA BAMBERG, SUPERINTENDENT
14909 ALDINE WESTFIELD
HOUSTON, TEXAS 77032.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge